Supreme Court, U.S.
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In The

Supreme Court of the United States

LESLIE DEWAYNE ALLEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the district court erred in allowing evidence of Appellant's prior criminal record of drug convictions to be introduced and heard by the jury, in violation of the Fed. R. Evid. 404(b) and 403, in that probative value was outweighed by the prejudicial effect.

B. Whether the district court erred in allowing government's exhibit ten (cocaine "crack" base) into evidence because the government could not establish a chain of custody for the evidence.

C. Whether there was clear evidence that law enforcement officers tampered with the evidence, and there was insufficient proof as to whether the cocaine offered into evidence was the same contraband found at the scene of Appellant's arrest.

D. Whether the district court erred in denying Appellant's motion for mistrial and motion for acquittal when the evidence presented at trial was insufficient as a matter of law to sustain a conviction.

E. Whether the district court erred in pre-trial proceedings in refusing to dismiss the indictment against appellant, pursuant to Fed. R. Crim. P., Rules 12 and 47, in that the arresting officers' outrageous conduct in planting drugs at the scene of the arrest required as a matter of law that the indictment against the appellant be dismissed.

F. Whether the district court erred in pre-trial proceedings in refusing to grant the Appellant's motion to suppress the fruits of an illegal vehicle stop which resulted in the arrest of appellant.

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Petitioner, Leslie Dewayne Allen, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit rendered in this case on August 13, 2010.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is found at *United States v. Allen*, No. 08-6363 (6th Cir. August 13, 2010) (unpublished). The opinion is reproduced in Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment was entered on August 13, 2010. Jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved are: 21 U.S.C. § 841(a)(1), and § 841(b)(1)(B):

Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in §§ 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the

provisions of 21 U.S.C. § 841(b)(1)(A) or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of §§ 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this

subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be

sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

18 U.S.C. § 924(c)(1)(A)(i), and § 922(g)(1):

§ 924

(c)

(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or

dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

§ 922

(g) Whoever, with the intent to engage in conduct which –

(1) constitutes an offense listed in § 1961(1),

STATEMENT

On August 29, 2006, Chattanooga City Police Officer Goodine ("Goodine") arrested Leslie Dewayne Allen. Mr. Allen was a passenger in a vehicle driven by Larry Bush ("Bush") which was the subject of a traffic stop by Goodine and Officer Mayweather ("Mayweather") due to an alleged seatbelt violation by Bush and the vehicle's license plate not being on file. Upon Goodine's approach to the vehicle, Bush fled the scene engaging the officers in a high-speed chase [Trial T. p. 105].

After officers stopped the vehicle, Goodine and Mayweather attempted to subdue Bush and Allen.

Mayweather stated that he noticed Allen open the passenger door and witnessed movement from him such as "dipping down and back up" [Trial T. p. 115]. Mayweather further testified that Appellant was non-compliant with verbal commands to exit the vehicle and was tazed by Goodine. [Trial T. p. 124]. Immediately following the tazing, Mayweather handcuffed Mr. Allen's wrist behind his back [Trial T. p. 125]. As Mayweather and other officers continued to secure the scene, Goodine went over to Allen and made a search of the backseat on the passenger side. Within a few moments, Goodine picked up a bag containing a white substance that Mayweather later identified as crack cocaine rocks [Trial T. p. 127]; however, Mayweather admittedly never did get a close look at the alleged cocaine [Trial T. p. 127]. Following the discovery of the cocaine, Mayweather searched around the vehicle and found a gun [Trial T. p. 129] underneath the driver's side of the vehicle [Trial T. p. 131]. At this time, both Bush and Allen were transported by law enforcement to the Hamilton County Jail.

A four-count indictment was issued on October 11, 2006 which charged: Count 1, conspiracy to distribute and possess with intent to distribute cocaine base; Count 2, possession with intent to distribute cocaine base; Count 3, possession of a firearm in furtherance of drug trafficking crimes; and Count 4, being a felon in possession of a firearm.

On November 30, 2006, Mr. Allen and his appointed counsel met with Agent Paul Healy of the

Federal Bureau of Investigation and Assistant United States Attorney Chris Poole in a proffer session [Trial T. p. 284]. At that time, Mr. Allen stated that on the night of his arrest, he received the firearm and drugs from Bush during the car chase, and Bush advised him to "get rid of it" [Trial T. p. 287]. Following this proffer, plea negotiations ensued in which Mr. Allen agreed to plead guilty to Counts One and Four. His plea agreement was entered into district court at hearing on January 8, 2007. [RE. 17 and 18]

Following the entry of the plea agreement, the relationship between Mr. Allen and his prior attorney disintegrated and Mr. Allen sent a letter to the district court seeking new counsel. The Court granted his request and appointed Ashley L. Ownby attorney on June 28, 2007. [RE. 25]

In April of 2007, Goodine, the arresting officer in Appellant's case, was the subject of an ongoing investigation by his department's Internal Affairs unit which ultimately led to his being indicted by the Hamilton County Grand Jury on multiple charges relating to theft and official misconduct. Based upon this indictment and upon viewing the police video footage of his arrest, Mr. Allen filed a motion to withdraw guilty plea. [RE. 26] The Court granted this motion on September 13, 2007. [RE. 46]

Among other pre-trial pleadings, Appellant also filed a motion to suppress the initial vehicle stop made by Goodine, alleging the stop was unconstitutional in that Goodine did not possess sufficient

probable cause to believe a violation had occurred and thus to justify the vehicle's stop. [RE. 53] The vehicle's tag was on file, contrary to Goodine's claim that it was not, and the Appellant asserted that the exclusionary rule should apply to suppress evidence obtained by the illegal search and seizure. After Government opposition was filed in response to this motion. [RE. 57] The district court denied the Appellant's motion on February 5, 2008, along with two separate motions the Appellant had filed to dismiss the indictment and to suppress and/or limit the evidence offered at trial. [RE. 65]

The Government provided its notice of intent to use Fed. R. Evid. 404(b) material regarding prior arrests of Appellant in its evidence against Appellant at trial. [RE. 75] Appellant responded in opposition to the usage of this material. [RE. 77] This matter proceeded to trial on August 5, 2008.

At trial, the Court set a limiting instruction regarding the admission of 404(b) material only for the purpose of establishing the Appellant's intent and identity in regards to the Indictment against him [Trial T. pp. 99-100].

During both direct and cross examination of Officer Mayweather, it became clear that Goodine was the arresting officer [Trial T. p. 165] and thereby was in charge of ensuring all evidence recovered at the scene was handled properly. Mayweather identified Government's Exhibit 11 as the firearm he discovered at the scene of the arrest [Trial T. p. 133], but

he could not clearly identify the bag of drugs presented at trial as the same recovered from the scene [Trial T. p. 133], as he did not originally find the bag.

Mr. Allen objected to Government Exhibit 10, the cocaine allegedly recovered from the scene, based upon lapses in the chain of custody [Trial T. pp. 239 and 241] and that it was never fully identified as the drugs recovered from the arrest scene. The Court held its ruling on this motion until testimony was heard by Agent Paul Healy regarding Appellant's proffer session [Trial T. pp. 285-286]. The Court then denied Appellant's motion and allowed Exhibit 10 to be admitted into evidence [Trial T. p. 338].

Following testimony of FBI Agent Healy and police officers who had previously arrested the Appellant for similar offenses, Appellant moved for a mistrial, based upon their testimony regarding gang-related activity falling outside the guidelines the Court had previously established for entry of 404(b) testimony [Trial T. p. 311]. Appellant argued that the probative value of their testimony far outweighed the highly prejudicial nature of his defense [Trial T. p. 312]. This motion was denied by the district court [Trial T. p. 314].

On August 6, 2008, the jury returned a verdict of guilty on all four counts of the indictment [Trial T. pp. 431-432]. Appellant was denied a motion for new trial. [RE. 106] Appellant was concurrently sentenced to three hundred and sixty months on Counts One,

Two, and Four, and to life on Count Three. [RE. 107 and 110]

Mr. Allen filed a motion for new trial on August 12, 2008, which was opposed by the Government in its response entered October 10, 2008, and was denied by the district court on October 30, 2008. [RE. 102, 105 and 106]

The United States Probation Office filed a Pre-Sentence Report on August 29, 2008. On November 3, 2008, Appellant was sentenced to life on Count Three to be served consecutively to the 360 months he was collectively sentenced for as to Counts One, Two and Four. [RE. 107 and 110]

Appellant filed a timely Notice of Appeal on November 6, 2008, and this matter was transferred to the United States Court of Appeals for the Sixth Circuit. [RE. 108] The United States Court of Appeals for the Sixth Circuit affirmed the judgment and sentence in a decision filed on August 13, 2010.

REASONS THE WRIT SHOULD ISSUE

Mr. Allen respectfully asserts that the lower courts committed reversible error in a number of ways. First, it was error to allow the jury to hear evidence of Mr. Allen's prior criminal record. It was also error to allow the crack cocaine admitted into evidence by an improper chain of custody.

Most significantly, the district court committed reversible error by violating Mr. Allen's due process rights when the court denied Mr. Allen's pre-trial motions for a mistrial, to dismiss the indictment and to suppress the fruits of an illegal search and his motion for acquittal.

A. THE DISTRICT COURT ERRED IN ALLOWING EVIDENCE OF APPELLANT'S PRIOR CRIMINAL RECORD OF DRUG CONVICTIONS TO BE INTRODUCED AND HEARD BY THE JURY, IN VIOLATION OF THE FED. R. EVID. P. 404(b) AND 403, IN THAT THE PROBATIVE VALUE WAS OUTWEIGHED BY THE PREJUDICIAL EFFECT.

At trial the district court ruled that "I will permit the government to put on evidence regarding Mr. Allen's prior convictions for the purpose of proving Mr. Allen's identity with respect to the crimes charged in the present indictment, and I find as the government argues that the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading of the jury, or considerations of undue delay, waste of time or needless presentation of the cumulative evidence as provided for in Rule 403." (T. p. 272, line 21-p. 273, line 5).

"The test in admitting evidence to show identity under 404(b) is one of relevance." *United States v. Bonds*, 12 F.3d 540, 572 (6th Cir. 1994). In *Bonds* the defendant was one of three co-defendants charged

with killing a store owner as he attempted to make a night deposit. The murder weapon was found and identified as a MAC-11. Later agents seized an identical weapon from the home of one of the co-defendants. At trial the court admitted the MAC-11 found in the co-defendant's home to show identity. The *Bonds* Court stated that "finding an identical MAC-11 with obliterated serial numbers in Verdi's possession 'tends to make it more probable than if [Verdi] had not possessed' such a gun that the MAC-11 was stolen along with the murder weapon in connection with the plot." *Id.* at 472, *quoting*, *United States v. Evans*, 848 F.2d 1352, 1360 (5th Cir.), *modified*, 854 F.2d 56 (5th Cir. 1988).

This Court, therefore, must first look at whether the evidence of prior convictions was relevant. Once the government began this line of questions with Agent Healy the Court noted that "we need to make it relevant to the charges that are before the Court." (T. p. 291, lines 17-19). When defense counsel objected the Court cautioned the Assistant United States Attorney, "I have already cautioned you . . . the charges in the indictment are what they are . . . Mr. Allen is charged with conspiracy." (T. p. 292, lines 13-16). Despite this the subject kept coming up. During a conference out of the presence of the jury the U.S. Attorney stated "we are offering this not, again, not to show that Mr. Allen has any propensity to commit this type of crime, but that he has in that, in the respect of throwing down drugs during previous arrests or, you know, for which in the case he was convicted of, he

has acted in a similar fashion for purposes of establishing his identity." (T. p. 298, lines 16-21).

The Court gave a limiting instruction that the jury should only "consider this evidence for the limited purpose of deciding whether it is Mr. Allen's identity as the perpetrator of this crime and for no other purpose." (T. p. 300, lines 21-24). However, the jury still heard evidence that they should not have.

First, evidence of Mr. Allen's criminal history was not relevant to identify him. His arrest was observed by two officers and recorded on one of the officer's dashboard camera. After being stopped by law enforcement he was placed in handcuffs and remained in custody until processed after his arrest. His identity was not in issue and, therefore, was not relevant. Even were the evidence to be found relevant, it should have been excluded under Rule 403 which states "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Here, presentation of Mr. Allen's prior criminal history had the effect of telling the jury that he was more likely to have committed the offenses in question because of his criminal history. This, in effect, constituted unfair prejudice to Mr. Allen that outweighed any possible probative value of the evidence. The Court was clearly concerned about this effect and

committed reversible error which was not cured by the limiting instruction given the jury.

B. THE DISTRICT COURT ERRED IN ALLOWING GOVERNMENT'S EXHIBIT TEN (COCAINE "CRACK" BASE) INTO EVIDENCE BECAUSE THE GOVERNMENT COULD NOT ESTABLISH A CHAIN OF CUSTODY FOR THE EVIDENCE. THERE WAS CLEAR EVIDENCE THAT LAW ENFORCEMENT OFFICERS TAMPERED WITH THE EVIDENCE AND THERE WAS INSUFFICIENT PROOF AS TO WHETHER THE COCAINE OFFERED INTO EVIDENCE WAS THE SAME CONTRABAND FOUND AT THE SCENE OF APPELLANT'S ARREST.

The Government introduced the testimony of Officer Terry Turner who works for the Chattanooga Police Department, property and evidence section [Trial T. p. 173] to clarify the chain of custody regarding evidence. He stated that proper procedure for submitting a controlled substance to his section consists of the arresting officer placing the substance in an evidence bag that is sealed shut with evidence tape, and the officer initialing both ends of the evidence tape [Trial T. p. 174]. Afterwards, the evidence bag is logged on the property intake sheet by the arresting officer or officer of record [Trial T. p. 174], is given a property identification number, and is taken to secure storage [Trial T. pp. 174-175]. The identification number is associated with the complaint

number for the related incident [Trial T. p. 176], and in this instance, the cocaine and firearm recovered from the arrest scene was given the ID number 06-3778 [Trial T. p. 178].

Goodine submitted the drugs and firearm into the Chattanooga Police Department Property and Evidence Section on August 30, 2006 [Trial T. p. 181], and Goodine signed the property intake sheet as the officer of record [Trial T. pp. 181-182]. The drugs were removed by Officer Randy Poland [Trial T. p. 191], taken to the local Drug Enforcement Administration office and relinquished into the control of Officer James Hixson [Trial T. p. 202]. Hixson removed the evidence from the Chattanooga Police Department bag and placed it in a DEA evidence bag [Trial T. p. 202] before disposing of the Chattanooga Police evidence bag [Trial T. p. 211].

In throwing out the evidence bag, all physical evidence that linked the cocaine to those submitted into the property and evidence section was destroyed [Trial T. p. 212]. From this incident, a reasonable person would have no way to verify the cocaine presented at trial was the same as the substance discovered at the scene. Further, the Government presented witness testimony that 10.2 grams of cocaine was recovered at the scene [Trial T. p. 194], but by the time the Drug Enforcement Agency in Miami, Florida, received the drugs for testing, the net weight of the substance had diminished to 8.3 grams [Trial T. p. 230]. This break in the chain of custody and variance in weight, as well as Mayweather admitting that he

never clearly identified the drugs as those recovered at the scene [Trial T. p. 164], creates reasonable doubt to the authenticity of the substance presented at trial.

It is true that as a general principle problems with the chain of custody go to the weight of the evidence rather than its admissibility. However, "serious gaps may render a chain of custody so deficient that exclusion is required." *United States v. Rawlins*, 606 F.3d 73, 82 (3rd Cir. 2003), *citing*, *United States v. Mejia*, 597 F.3d 1329, 1336 (D.C. Cir. 2010). The *Rawlins* Court did not overturn the trial court's decision noting that there was no clear abuse of discretion and also there was a presumption of regularity in the handling of evidence by law enforcement.

Any presumption of regularity should not be given credibility in the case at bar. First, the officer in question was already shown to have committed official misconduct. Second, the only witness on point for the government was a fellow officer who could only say that it looked like the same evidence. He couldn't positively identify it. Also, the evidence bag which would have linked the cocaine to the arrest had been removed and discarded. Finally, there was video evidence of the evidence appearing at the scene of the arrest **after** Mr. Allen was already in custody. Given these serious gaps in the chain of custody it was inappropriate for the trial court to admit the crack cocaine into evidence.

C. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AND MOTION FOR ACQUITTAL WHEN THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION.

The denial of a motion for a mistrial is reviewed under an abuse-of-discretion standard. *United States v. Wimbley*, 553 F.3d 455 (6th Cir. 2009). The standard of review on denial of a motion for acquittal is the same at the appellate level as at the trial level. The evidence is viewed in the light most favorable to the government and if the relevant evidence could lead to the conclusion that the jury could find the defendant guilty, the denial of the motion for acquittal should be affirmed. *United States v. Weed*, 689 F.2d 752, 756 (7th Cir. 1982); *United States v. Collins*, 955 F.2d 45 (6th Cir. 1992).

Following the government's case, the defense moved for an acquittal which was denied. The defense then rested and renewed its motion. The motion was again denied. Despite the relatively low standard which the government is required to meet to sustain a motion for acquittal the Court committed reversible error in denying the motion. Here, the defense presented clear evidence of police misconduct during the arrest. In fact, there was a pattern of misconduct by the arresting officer which had lead to his termination from the department and his indictment prior to the trial.

Even taking all reasonable inferences in a light most favorable to the government there was insufficient evidence to support the conviction. At trial, the defense presented dashboard video of the arrest. The video shows drugs appearing under the vehicle after Goodine went into the vehicle and after Mr. Allen was in handcuffs beside the road. Despite this evidence the district court never made any findings of fact regarding the officers' misconduct. The Sixth Circuit did not review the evidence in any form or fashion and did not even address the subject in their opinion. Rather than excluding the evidence to deter police misconduct the trial court committed reversible error by admitting the evidence and the Circuit Court failed to address the question of misconduct.

D. THE DISTRICT COURT ERRED IN PRE-TRIAL PROCEEDINGS IN REFUSING TO DISMISS THE INDICTMENT AGAINST APPELLANT, PURSUANT TO FED. R. CRIM. P. 12 AND 47, IN THAT THE ARRESTING OFFICERS' OUTRAGEOUS CONDUCT IN PLANTING DRUGS AT THE SCENE OF APPELLANT'S ARREST REQUIRED AS A MATTER OF LAW THAT THE INDICTMENT AGAINST THE APPELLANT BE DISMISSED.

The issue which was squarely before the district court and which is now before this Court is the appropriate treatment of Mr. Allen's case in light of clear evidence of police misconduct. In this matter,

the arresting officer, Goodine, had been terminated from the force and was under indictment at the time of trial. But the question was not just amorphous misconduct. Rather, the defense presented dashboard camera evidence showing that Goodine planted the crack cocaine which he later picked up and attributed to Mr. Allen.

"Under the outrageous government conduct defense, conviction may be improper even if the evidence establishes a predisposition to commit the crime: this defense looks only at the government's conduct and determines whether it is sufficiently outrageous so as to violate the Constitution." *United States v. Warwick*, 167 F.3d 965, 974 (6th Cir. 1999), *citing*, *United States v. Sneed*, 34 F.3d 1570, 1576 (10th Cir. 1994).

In *Warwick* this Court considered the question of whether the defendant's acceptance of a weapon from a law enforcement officer constituted outrageous government conduct. "A defendant who does nothing more than accept a weapon offered to him by an undercover officer cannot be said to 'actively' do anything with that weapon because receipt and acceptance is inherently passive conduct." *Id.* at 976, *citing*, *United States v. Westmoreland*, 122 F.3d 431 (7th Cir. 1997).

The conduct in this case is far more significant than that in *Westmoreland*. Here, the police misconduct constituted the actual planting of crack cocaine at the scene of Mr. Allen's arrest and the charging of

him with possession of those drugs. This conduct was as outrageous as could be imagined and justified dismissal of the action.

E. THE DISTRICT COURT ERRED IN PRE-TRIAL PROCEEDINGS IN REFUSING TO GRANT THE APPELLANT'S MOTION TO SUPPRESS THE FRUITS OF AN ILLEGAL VEHICLE STOP WHICH RESULTED IN THE ARREST OF APPELLANT.

The defense made several pre-trial motions including the motion to dismiss, discussed above, and a motion to suppress. The district court committed reversible error in denying the motion to suppress because the evidence presented against the Appellant – the crack cocaine and the gun – were both "seized" by law enforcement after the vehicle in which Mr. Allen was riding was improperly stopped.

CONCLUSION

For the reasons stated herein, this Honorable Court should grant the Petitioner's Petition for Writ of Certiorari.

This the 11th day of November, 2010

Respectfully Submitted,

ASHLEY L. OWNBY
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Cleveland, TN 37311
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Attorney for Leslie Dewayne Allen, Petitioner

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 08-6363

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee,** **v.** **LESLIE DEWAYNE ALLEN,** **Defendant-Appellant.**	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE** **OPINION** (Filed Aug. 13, 2010)

BEFORE: SUTTON and McKEAGUE, Circuit Judges; JONKER, District Judge.*

McKEAGUE, Circuit Judge. Defendant-Appellant Leslie Allen was arrested by Chattanooga Police Officers Lawrence Goodine and Lee Mayweather after a car that he was a passenger in fled from the police. The officers recovered drugs and a handgun from the scene. Allen challenges his convictions stemming from this arrest. However, we do

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* The Honorable Robert J. Jonker, United States District Judge for the Western District of Michigan, sitting by designation.

not find his arguments convincing and, therefore, **AFFIRM** the judgment.

I. BACKGROUND

On August 29, 2006 Officer Goodine attempted to stop a rental car, which Larry Bush was driving with Allen as his only passenger. Bush initially stopped, but then fled and led police on a car chase, which ended when Bush turned onto an intersecting street and came to a stop near the curb. Officers Goodine and Mayweather approached the car and instructed Bush and Allen to get out of the vehicle. Bush immediately complied, but Allen did not. Allen was ultimately tasered by Officer Goodine, at which point Allen fell to the ground and was handcuffed by Officer Mayweather. Officer Goodine found a bag containing a white powdery substance that later turned out to be cocaine base; Officer Mayweather found a handgun under the vehicle, which he believed, based on its location and Allen's movements, had been slid underneath the car from the passenger's side. A police camera located in Officer Mayweather's cruiser recorded the arrest.

A grand jury indicted Allen for: conspiring to distribute and possess with intent to distribute more than five grams of crack cocaine; possessing with intent to distribute more than five grams of crack cocaine; possessing a firearm in furtherance of a drug trafficking crime; and possessing a firearm after a felony conviction. Allen pled guilty, but the district

court allowed him to withdraw his guilty plea and proceed to trial after Officer Goodine was indicted on multiple charges relating to theft and official misconduct. The jury found Allen guilty of all counts, and he was sentenced to 360 months on Counts One, Two, and Four, with the sentences to run concurrently. Allen received a life sentence on Count Three, to be served consecutively with the other sentences. This timely appeal followed.

II. ANALYSIS

Allen challenges whether: (1) there was sufficient evidence to support his conviction; (2) evidence of prior acts should have been admitted under Rule 404(b); (3) there was a proper chain of custody for the crack cocaine found at the scene of the arrest; (4) the district court erred in refusing to dismiss his indictment due to outrageous government conduct; and (5) the district court erred in refusing to grant his motion to suppress.

1. Sufficiency of the evidence

Allen challenges the sufficiency of the evidence with respect to his motion for mistrial and his motion for acquittal concerning his convictions for possession and conspiracy to possess. The denial of a motion for acquittal is reviewed de novo to ascertain, "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." *United States v. Garrido*, 467 F.3d 971, 984 (6th Cir. 2006) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original).[1]

To show a drug conspiracy, the government must prove the following elements beyond a reasonable doubt: "(1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy." *United States v. Welch*, 97 F.3d 142, 148-49 (6th Cir. 1996). The evidence that the defendant agreed to join a conspiracy to violate the drug laws "need only be slight." *United States v. Hodges*, 935 F.2d 766, 773 (6th Cir. 1991). To show possession of a controlled substance with intent to distribute, the government must prove that: (1) the defendant knowingly, (2) possessed a controlled

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[1] The denial of a motion for mistrial is reviewed under an abuse of discretion standard. *United States v. Wimbley*, 553 F.3d 455, 460 (6th Cir. 2009). Allen cites *Wimbley*, but does not elaborate where or how the district court erred in denying his motion for a mistrial. Therefore, we find that this issue is waived. *United States v. Roach*, 502 F.3d 425, 442 (6th Cir. 2007) (noting that claims the proponent fails to develop arguments in support of are deemed waived); *see also United States v. Watkins*, 179 F.3d 489, 500-01 (6th Cir. 1999) (noting that the appellant has a "duty to point to the parts of the record that support his position and also to present arguments in sufficient detail to show how they support his position"). Similarly, Allen does not challenge his convictions stemming from Counts Three or Four; therefore, we find that any argument based on the sufficiency of the evidence to support these convictions is also waived.

substance, (3) with intent to distribute. *United States v. Coffee*, 434 F.3d 887, 897 (6th Cir. 2006).

There was sufficient evidence for a rational trier of fact to convict Allen on all counts. The jury heard evidence that Allen admitted that he and Bush had spent the day together, that Bush was initially driving an Oldsmobile, but that they rented another vehicle and were driving that vehicle when arrested. They also heard that Allen had told Agent Healy that Bush got a phone call, and that Allen believed Bush went upstairs to get some crack cocaine before they left in the rental car. They heard that Allen and Bush were members, "OGs" or Original Gangsters, in the Athens Park Blood Gang, and were engaged in drug dealing together. Agent Healy also testified that Allen told him that Bush gave him the gun and the drugs prior to the stop and told him to get rid of them. In response, Allen said that he slid the gun under the car and put the drugs in his pocket. Officer Mayweather testified that he saw Allen open the passenger door and make movements consistent with throwing something away. Agent Hennessee testified, and the defendant stipulated, that eight grams of crack cocaine is a distribution amount. Agent Hennessee also said that drug traffickers often use rental cars to prevent detection, and that drug traffickers do not ask uninvolved individuals to participate in their drug trafficking endeavors.

Allen essentially requests that we ignore the evidence presented against him at trial and interpret the video as, "clear . . . evidence that Goodine planted

the drugs. . . ." (Appellant Br. at 19.) The district court found – correctly – at trial that: "[t]he video alone is . . . inconclusive as to the source of the bag of cocaine." (R. 113 at 261). To now interpret it as Allen desires is a far cry from viewing the evidence in the light most favorable to the prosecution. Clearly a rational juror could have concluded that Allen committed each of the essential elements of the crimes for which he was convicted, and that Officer Goodine did not plant the crack cocaine. Consequently, there was sufficient evidence to support the denial of the motion for acquittal.

2. Prior acts evidence

The district court admitted evidence of two prior drug convictions for the "purpose of proving [Allen's] identity with respect to the crimes charged in the present indictment." (R. 113 at 272.) Allen argues on appeal that this evidence should not have been admitted under Federal Rules of Evidence 404(b) and 403.

As an initial matter, any potential error was clearly harmless. "An error is harmless unless one can say, with fair assurance that the error materially affected the defendant's substantial rights – that the judgment was substantially swayed by the error." *United States v. Murphy*, 241 F.3d 447, 453 (6th Cir. 2001). In this case, Agent Healy testified that Allen told him that Bush gave him the drugs, and that he put them in his pocket. Furthermore, contrary to

Allen's claims, the video tape evidence does not show that Officer Goodine planted the drugs. Nor at any rate was there an abuse of discretion in admitting the evidence. Rule 404(b) states that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

Prior to admitting Rule 404(b) evidence, the district court must: (1) make a preliminary finding as to whether sufficient evidence exists that the prior act occurred; (2) determine whether the other act is admissible for one of the proper purposes outlined in Rule 404(b); and (3) apply Rule 403 balancing to determine whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice or the other concerns embodied in Rule 403. *United States v. Mack*, 258 F.3d 548, 553 (6th Cir. 2001).

We review the district court's decision to admit this evidence for an abuse of discretion. *See United States v. Haywood*, 280 F.3d 715, 720 (6th Cir. 2002). "Generally, an abuse of discretion is evident when the reviewing court is firmly convinced that a mistake has been made. A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or

uses an erroneous legal standard." *Ross v. Duggan*, 402 F.3d 575, 581 (6th Cir. 2004) (citation omitted).[1] Prior acts or crimes can be admitted to show identity, provided they are "of sufficient distinctive similarity" with the charges in the indictment to "create a pattern or modus operandi." *United States v. Perry*, 438 F.3d 642, 648 (6th Cir. 2006) (noting that "[i]t is not necessary . . . that the crimes be identical in every detail"); *see also Mack*, 258 F.3d at 554 (noting that "standard conduct, although not particularly unusual by itself, may, in combination, present an unusual and distinctive pattern constituting a 'signature'").

Allen challenges the final two prongs of the standard: namely, (1) whether the other acts evidence

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[1] In *Haywood*, we repudiated the three-tiered standard of review for Rule 404(b) determinations in light of *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997), which explained that "abuse of discretion is the proper standard of review of a district court's evidentiary rulings." 280 F.3d at 720; *see also United States v. Love*, 254 F. App'x 511, 514 (6th Cir. Nov. 14, 2007) ("Thus, to the extent that cases after *Haywood* and *Mack* apply the three-tiered standard of review, they are errant because 'when a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case.'"). In *United States v. Bell*, 516 F.3d 432, 440 (6th Cir. 2008), this court stated that it would review de novo "the district court's legal determination that the evidence was admissible for a proper purpose." *Id.* (noting that the de novo and the abuse of discretion standards are not, in fact, inconsistent "because it is abuse of discretion to make errors of law or clear errors of factual determination") (citation omitted). However, even if the two standards are consistent, we continue to follow our earlier precedent and apply an abuse of discretion standard of review.

was admissible for a proper purpose and (2) the district court's balancing under Rule 403. Initially, he argues that identity was not disputed because his arrest "was observed by two officers" and recorded on the dashboard camera of Officer Mayweather's patrol car. (Appellant Br. at 15.) However, Allen based his defense on the theory that Officer Goodine planted the crack cocaine at the scene. This theory called into question the identity of the person who put the crack cocaine at the scene of the arrest, which was important to proving the charges in the indictment. Admittedly, it seems clear from the video that either Allen or Officer Goodine placed the drugs at the scene. However, even though there were a limited number of possibilities, Allen still put identity in dispute through his defense.

Furthermore, in the prior acts, as in this case: (1) Allen was approached by a police officer; (2) there was at least one other person with Allen; (3) the crack cocaine was found near Allen, but not on his person. Additionally, in both of the prior acts (4) Allen pled guilty to possessing the crack cocaine.[2] As in previous

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[2] Officer Bolton testified that on June 20, 2004, while he was talking with Allen and several other individuals about possible narcotics activity, he saw Allen fling a bag of crack as they exited a residence together. Allen was arrested for, and later pled guilty to, possession. Officer Pickard testified that on June 23, 2004, he noticed Allen and two other individuals standing on a street corner. He stopped and talked to them, and Officer Bolton found a plastic bag containing approximately thirty-nine crack rocks about ten feet from where Allen stood.

(Continued on following page)

cases admitting evidence to show identity, these prior acts are of sufficient distinctive similarity with the charges in the indictment to "create a pattern or modus operandi" and, therefore, to help identify that it was Allen, not Officer Goodine, who possessed and discarded the crack cocaine at the scene. Therefore, these acts were admissible for a proper purpose under Rule 404(b).

Allen also argues that the prior acts evidence should have been excluded under Rule 403. To make this determination, this court looks "at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *Perry*, 438 F.3d at 649; *see also Mack*, 258 F.3d at 555 (noting that the district court "is granted 'very broad' discretion in determining whether the danger of undue prejudice outweighs the probative value of the evidence"). As noted, the prior acts had probative value. Furthermore, this probative value was not substantially outweighed by the potential for unfair prejudice, which was minimized. The testimony from Officers Bolton and Pickard was limited in scope and duration and the district court provided limiting instructions before each witness testified and during the general charge. Consequently, the district court did not abuse its discretion in admitting the two prior convictions under Rule 404(b).

Allen was arrested for, and later pled guilty to, possession of crack cocaine for resale.

3. Chain of custody

The district court did not abuse its discretion in admitting the crack cocaine into evidence over Allen's objection. Evidentiary issues are reviewed under an abuse of discretion standard. *Joiner*, 522 U.S. at 141. Chain of custody issues are jury questions and the possibility of a break in the chain of custody of evidence goes to the weight of the evidence, not its admissibility. *United States v. Allen*, 106 F.3d 695, 700 (6th Cir. 1997); *United States v. Drake*, 280 F. App'x 450, 454-55 (6th Cir. May 29, 2008). Physical evidence is admissible when the possibilities of misidentification or alteration are "eliminated, not absolutely, but as a matter of reasonable probability." *United States v. McFadden*, 458 F.2d 440, 441 (6th Cir. 1972) (citation omitted). Merely raising the possibility of tampering is insufficient to render evidence inadmissible. *Allen*, 106 F.3d at 700. Where there is no evidence indicating that tampering with the exhibits occurred, courts presume public officers have discharged their duties properly. *Id.*

Allen presents no actual evidence that tampering occurred. In particular, Allen argues that the original evidence bag was destroyed and replaced with a DEA evidence bag, and that the weight of the crack cocaine diminished over time. However, it does not appear that there was anything improper about Officer Hixon's replacement of the original evidence bag, and Agent Montejo provided several explanations for the decrease in weight. At most, Allen's arguments merely raise the possibility of tampering. Consequently,

the district court did not abuse its discretion in admitting the crack cocaine.

4. The indictment

Allen argues that the dashboard video evidence shows that Officer Goodine, who was terminated from the force and was under indictment at the time of the trial, planted crack cocaine at the scene, and that this outrageous government conduct presents a question of law that should be reviewed de novo. (Appellant Br. at 20-21.) The Supreme Court has indicated that outrageous government conduct outside the grand jury process could result in dismissal on due process grounds if such conduct is so outrageous that it violates "fundamental fairness" or is "shocking to the universal sense of justice." *United States v. Russell*, 411 U.S. 423, 432 (1973). However, in this case, the video simply does not show that Officer Goodine planted the crack cocaine, and there is no basis in the evidence for finding outrageous government conduct.

5. The motion to suppress

Allen argues that the evidence seized at the traffic stop should have been suppressed, since the stop was improper. However, "[i]t is widely recognized that '[i]f a suspect's response to an illegal stop "is itself a new, distinct crime, then the police constitutionally may arrest the [suspect] for that crime."'" *United States v. Castillo*, 2000 WL 1800481 at *5 (6th Cir. Nov. 28, 2000) (citations omitted). In *Castillo* the

defendant claimed that the arresting officers lacked reasonable suspicion to detain him; though, while the officers were conducting a driver's license check, he fled in his vehicle, leading police on a high speed chase. The court concluded that this, "high-speed flight . . . constituted an intervening act that purged the taint of [the defendant's] detention." *Castillo*, No. 99-5463, at *6.

Here, there was an initial attempt at a traffic stop, which Allen claims to have been illegal, followed by an attempt to escape from the police by leading the officers on a high-speed chase. As it did in *Castillo*, the act of fleeing from police officers constituted a new, distinct crime that rendered evidence subsequently seized admissible. Therefore, we find that the district court properly admitted the evidence seized during Allen's arrest.

III. CONCLUSION

In short, finding Allen's arguments unpersuasive, we **AFFIRM** the judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
Eastern District of Tennessee

UNITED STATES OF AMERICA
V.
LESLIE DEWAYNE ALLEN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Nov. 12, 2008)

Case Number: 1:06-CR-107-001

Ashley L. Ownby
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

_____

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[✓] was found guilty on counts(s) One, Two, Three and Four of the Indictment after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)

See next page.

The defendant is sentenced as provided in pages 2 through 7 of this judgment and the Statement of Reasons. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. §3553.

[ ] The defendant has been found not guilty on count(s)___

[ ] Counts ____ [ ] is [ ] are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

11/3/2008
Date of Imposition of Judgment

/s/ Harry S. Mattice, Jr.
Signature of Judicial Officer

HARRY S. MATTICE, JR.,
United States District Judge
Name & Title of Judicial Officer

11/12/2008
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 846, 841(a)(1), and (b)(1)(B)	Conspiracy to Distribute Five Grams or More of Cocaine Base	8/29/2006	One
21 U.S.C. § 841(a)(1) and (b)(1)(B)	Possession and Distribution of Five Grams or More of Cocaine Base	8/29/2006	Two
18 U.S.C. §§ 924(c)(1)(A)(i) and 3559(c)	Use of a Firearm During and In Relation to a Crime of Violence	8/29/2006	Three
18 U.S.C. §§ 922(g)(1) and 924(e)	Felon in Possession of a Firearm; Armed Career Criminal	8/29/2006	Four

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 360 months, plus LIFE.

This term consists of terms of 360 on each of Counts One, Two and Four, to be served concurrently. And a Term of LIFE on Count Three to run consecutively to all other counts.

[✓] The court makes the following recommendations to the Bureau of Prisons:

That the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program.

[✓] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at ____ [ ] a.m. [ ] p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on ____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 8 years.

This term consists of a term of 8 years on each of Counts One and Two, and a term of 5 years on each of Counts Three and Four, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[✓] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

[✓] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 6. The assessment is ordered in accordance with 18 U.S.C. § 3013.

	Assessment	Fine	Restitution
Totals:	$400.00	$	$

[ ] The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, if the United States is a victim, all other victims, if any, shall receive full restitution before the United States receives any restitution, and all restitution shall be paid to the victims before any restitution is paid to a provider of compensation, pursuant to 18 U.S.C. § 3664.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS:	$____	$____	

[ ] If applicable, restitution amount ordered pursuant to plea agreement $_____

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

The defendant shall pay interest on any fine or restitution of more than $2500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] The interest requirement is waived for the [ ] fine and/or [ ] restitution.

[ ] The interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [✓] Lump sum payment of $400.00 due immediately, balance due

[ ] not later than _____, or
[✓] in accordance [ ] C, [ ] D, or [ ] E, or [✓] F below; or

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] F below); or

C [ ] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to

commence ____ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within 0_____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [✓] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Unless otherwise directed by the court, the probation officer, or the United States attorney, all criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to **U.S. District Court, 900 Georgia Ave., Room 309, Chattanooga, TN 37402**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

_____